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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 999

CITY OF AUBURN,

Appellant,

v.

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION, ET AL.,

Appellees.

No. 1003

LIVINGSTON ANTI-MERGER COMMITTEE,

Appellant,

v.

INTERSTATE COMMERCE COMMISSION, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION OF GREAT NORTHERN RAILWAY COMPANY, ET AL., TO AFFIRM

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INDEX

PAGE

Motion to Affirm 1

I. Appeal of City of Auburn 2

II. Appeal of Livingston Anti-Merger Committee.... 7

Conclusion 15

CITATIONS

CASES:

Farmers Loan and Trust Co. v. *Northern Pacific Railroad Co.* (U.S. Cir. Ct. E.D. Wis.; unreported) 10

Key v. *United States,* 263 F. Supp. 544 13

Landell v. *Northern Pacific Railway Co.,* 122 F. Supp. 253, aff'd 223 F.2d 316, cert. denied 350 U.S. 844....8, 10, 12-13

Northern Pacific Railway Co. v. *Boyd,* 228 U.S. 482 ..11-12

Northern Pacific Railway Co. v. *Townsend,* 190 U.S. 267 11

Penn-Central Merger Cases, 389 U.S. 486 7

Schmidt v. *United States,* 102 F.2d 589 12

United States v. *Northern Pacific Railway Co.,* 311 U.S. 317 12

STATUTES:

Interstate Commerce Act

49 U.S.C. Sec. 5(2)(a) 8, 13

49 U.S.C. Sec. 5(11) 14

Administrative Procedure Act

5 U.S.C. Sec. 551 *et seq.* 13

Other Statutes

Act of July 2, 1864 (13 Stat. L. 365) 8, 14

Act of June 25, 1929 (46 Stat. L. 41) 12

Joint Resolution of May 31, 1870 (16 Stat. L. 378)...9, 14

MISCELLANEOUS:

28 Land Dec. 103 11

29 Land Dec. 316 11

21 Op. Atty. Gen. 486 10

25 Op. Atty. Gen. 401 11

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Pursuant to Rule 16(1)(c) of the Rules of this Court, appellees Great Northern Railway Company, Northern Pacific Railway Company, Chicago, Burlington & Quincy Railroad Company, Spokane, Portland and Seattle Railway Company, Pacific Coast R.R. Co. and Great Northern Pacific & Burlington Lines, Inc., move that the judgment of the District Court be affirmed on the ground that the questions presented are so clearly lacking in substance as not to warrant further briefing and oral argument.

These appellees have filed motions to affirm in the appeals from the same judgment that have been docketed in this Court by the Solicitor General (No. 899) and by Brundage, *et al.* (No. 942). The motion in No. 899 describes these appellees, the proposed transactions and the proceedings below.

I.

APPEAL OF CITY OF AUBURN

The City of Auburn's contentions were reviewed and found lacking in merit by the Hearing Examiner (Exam. Rep. 359-360, 430-433); by the Commission (App. 334-336); and by the District Court (App. 52-53).[1]

Auburn, located in the Greater Seattle area, had a population of 11,000 in 1960 (Exam. Rep. 359) and now has about 19,000 (Auburn J.S. 3). Despite Auburn's small size, three competing railroads will be serving Auburn shippers and receivers after the merger: Union Pacific, Milwaukee and the merged company. This is the same number of railroads that serve the entire San Francisco area. Significantly, the shippers and receivers at Auburn do not join the city in this appeal and neither do the railroad employees. Those shippers, receivers and employees will obtain, under the merger, the important benefits described by the Commission (App. 305-311, 323-328, 468).

The Commission properly rejected Auburn's contention that the merger should be disapproved because of its alleged consequential effects on the purely local interests of

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[1] References herein to "App." are to the Appendix to Jurisdictional Statement for the United States in No. 899. References to "Exam. Rep." are to the Recommended Report of the Commission's Hearing Examiner, made a part of the Commission's order (App. 496).

Auburn. The evidence fully supported the Commission's finding that there was no indication of any long-range, serious adverse effect on Auburn but that in the long run the merger would result in benefits to Auburn and other communities in the Northern Tier of states. Furthermore, Auburn's claim of consequential injury rests upon one aspect of the proposed operating plan—the closing of a yard at Auburn—and that proposal to close the yard has since been abandoned with the result that there will be no reduction of employment at Auburn.

The city's basic contention has been that the merger should be disapproved so that Northern Pacific employees now living there would not move to other localities and spend their wages at those points rather than with Auburn merchants. Upon the closing of the Northern Pacific freight yard at Auburn a new unified freight classification yard was to have been constructed at South Seattle, about 12 miles by highway from Auburn (Exam. Rep. 107; Tr. 7040-41). Trains of the merged company handling through transcontinental traffic to or from the Tacoma-Seattle area would be made up or disassembled at the proposed new yard.[2] The details of the estimated loss of payroll at

[2] The preferred route for those through trains will use the efficient Great Northern freight route via Everett for the haul across the Cascade Mountains to or from Spokane rather than the Northern Pacific Stampede Pass route between Auburn and Spokane via Yakima but the latter route will also be used (in addition to its regular local service) as a "secondary main line through freight route" (Exam. Rep. 107, 359). Auburn agreed at page 7 of its brief to the court below that merger will make it possible for the merged company to handle its transcontinental through traffic over the more expeditious and efficient route, saying that "The Great Northern line from Everett east via Cascade Tunnel, moreover, averages a less severe grade than the [Northern Pacific] Stampede Pass route from Auburn."

Auburn and collateral effect on the city's economy were described by the Examiner (Exam. Rep. 359). The testimony of a Seattle economist for the Milwaukee Road, however, showed that the prospective economic growth at Auburn would "within a reasonable period of time offset that temporary employment disadvantage" (Tr. 6836; App. 335). Auburn's subsequent rapid growth—from 11,000 in 1960 to 19,000 now—has confirmed that evaluation.

In its Second Report, approving the merger subject to extensive conditions that will strengthen the competitive ability of the Milwaukee at Auburn and elsewhere, the Commission referred to Auburn and considered the economic effect of the unification there and at certain other communities (App. 334-336). Noting, pursuant to the statutory criteria, that "the primary concern of this Commission herein is the development of an efficient and economical transportation system" (App. 335), the Commission stated:

> "The record does not show, moreover, that the transportation requirements or the well-being of these areas and communities would best be served by denial of these applications. To the contrary, the evidence does not indicate any long-range, serious adverse effect on them. In our view, these mergers, suitably conditioned, augur an era of increased railroad strength, both in intermodal and intramodal competitive aspects in the long run resulting in a benefit to, and not a burden on, communities in the northern tier States." (App. 336)

In arguing that the Commission should have reopened the record on various subjects, Auburn fails to mention the fact that at no time did it petition for a reopening on any subject. Nor did Auburn offer any evidence at the reopened hearings in 1967, or file a brief with the Commission when

it was reconsidering the issues, or petition for reconsideration of the Commission's report approving the merger. In May, 1968, however, Auburn brought suit, Civil No. 7706, in the United States District Court for the Western District of Washington (Northern Division) to set aside the Commission's order. After its request for a stay of that order was denied, Auburn intervened in the suit brought by the Justice Department in the court below.

As the District Court found (App. 52-53), the Commission gave due consideration to the Auburn situation in determining that the merger, as conditioned by the Commission, would be consistent with the public interest. Moreover, because of the interim developments mentioned at page 5 of Auburn's Jurisdictional Statement, there will be no reduction in railroad jobs at Auburn after the merger; instead, additional facilities will be constructed there by the merged company. In its brief below, Auburn informed the court at pages 11 and 12 that the president and chief executive officer of Northern Pacific had sworn in an affidavit filed in Auburn's suit in the Western District of Washington "that as a result of this economic growth [in and around Auburn], and increased TOFC (piggyback) and container-on-flatcar traffic, the Auburn yard will *not* be closed but rather maintained." (See App. 53, fn. 24.)[3] Thus,

[3] President Menk of the Northern Pacific stated in his affidavit "that as a result of the economic growth and of the increase in trailer-on-flatcar and container-on-flatcar traffic, the merged company will not shift Auburn Yard operations to South Seattle as was initially planned and will instead construct facilities for handling additional traffic in Auburn; that the locomotive facilities at Auburn will continue to be used; that the large Northern Pacific yard at Auburn will be retained and improved and will remain at least at the existing level of use as a key maintenance and switching facility on the new system; that employment at Auburn will not be

the jobs will stay at Auburn and Auburn has even less reason for objecting than before.

Auburn's rail transportation service will be ample and improved. In addition to the competing service by the Union Pacific and Milwaukee railroads at Auburn, the merged company's daily freight service there will include two eastbound trains on the Auburn-Yakima line and two such westbound trains plus the service between Auburn and the Interbay yard at Seattle for connection with the transcontinental east-west freight trains and plus daily service by several north-south trains.[4]

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reduced as a result of the merger; . . ." (Par. III). Similarly, Vice President Eckart of Great Northern stated in his affidavit "That the merger will not result in any reduction of employment in the City of Auburn; that it was formerly contemplated that following the merger the Northern Pacific Railway Company's yard at Auburn would be closed and that the functions of that yard would be transferred to a new one to be constructed at South Seattle; that major changes have taken place in the Puget Sound region, and the area surrounding Auburn in particular, which have caused that plan to be abandoned; . . ." (Par. V).

[4] Northern Pacific's General Superintendent of Transportation, C. W. Thompson, in his affidavit filed in Auburn's suit in the Western District of Washington, set out the full details of the freight service operations for Auburn after merger day ("M Day"), stating, in part: "Through freight service northbound and southbound at Auburn will be better after M Day than it is today. . . . [F]rom Auburn through Yakima. . . . [a]fter M Day we propose to operate two trains daily in each direction. In addition, there will be movement of traffic between Auburn and Seattle (Interbay) for connection with expedited transcontinental east-west freight trains. Through freight service eastbound and westbound will be better after M Day than it is today. . . . Local and transfer service at Auburn after M Day will be at least equal to that presently performed." (Pars. IV-VI)

In the *Penn-Central Merger Cases,* 389 U.S. 486, the City of Scranton and Borough of Moosic contended that they would suffer from curtailment of service and sought to set aside the Commission's approval of the merger. This Court rejected the contentions of those municipalities and added that their claims "may be asserted in appropriate proceedings when such curtailment is specifically proposed" (389 U.S. at 504). So may the City of Auburn assert any such claims. Furthermore, the Commission here has expressly provided in its order that "the jurisdiction of this Commission in these proceedings be, and it is hereby, expressly retained for a period of 5 years from the date of the effectiveness hereof for the purpose of making such further order or orders in these proceedings as may be necessary or appropriate; . . ." (App. 462). Auburn not only will have improved service but also is amply protected.

II.

APPEAL OF LIVINGSTON ANTI-MERGER COMMITTEE

The Livingston Anti-Merger Committee is composed of certain Northern Pacific employees and other persons residing at or near Livingston, Montana. It presented testimony by several witnesses regarding alleged job loss, economic impact and various railroad operations—subjects which are not raised in the Committee's appeal. In addition, one witness, a Washington, D. C. attorney, tendered an exhibit consisting of a legal argument directed principally to a contention (a) that Northern Pacific Railway Company ("Railway Co.") does not own the properties it has operated as owner since 1896, in which year they were conveyed to it by master's deed with judicial approval in a mortgage foreclosure proceeding, and (b) that title is in Northern Pacific Railroad Company ("Railroad Co."), an

inactive corporation chartered by Congress in 1864, the stock of which is 97 percent owned by Railway Co. The witness, Robert W. Lishman, had been the attorney for minority stockholders of Railroad Co. in a suit in the District of Columbia in which those stockholders had been held barred by laches from attacking the title of Railway Co.[5]

The Examiner sustained an objection to witness Lishman's exhibit because of its character as a legal brief but indicated it could be filed, at the appropriate time, as part of the Committee's brief (Tr. 14065-14070; Liv. J.S. App. 46).[6] The brief was so filed (Liv. J.S. App. 46).

The Examiner, in his Recommended Report, summarized and discussed the Committee's contentions as to factual effects of the merger and its contentions that title is in the old federal corporation, Railroad Co., and that the Commission is without jurisdiction to authorize the proposed transactions (Liv. J.S. App. 34-41). The Examiner concluded that the contentions were without merit, stating, in part, that Section 5(2)(a) of the Interstate Commerce Act "does not contemplate litigation before the Commission of title to the properties or franchises claimed by and in the possession of the applicant carriers" (Liv. J.S. App. 39-40).

In its First Report, the Commission described the origin of Northern Pacific's land-grant properties and stated: "The rights to them were acquired by Northern Pacific at

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[5] *Landell* v. *Northern Pacific Railway Co.*, 122 F.Supp. 253 (1954), aff'd 223 F.2d 316 (1955), cert. denied 350 U.S. 844. Witness Lishman had "made a study of the Northern Pacific at the request of a relative who is an officer of a committee of dissenting stockholders of the predecessor of Northern Pacific" (Livingston J.S. App. 36).

[6] References to "Liv. J.S. App." are to the appendix attached to the Jurisdictional Statement of Livingston Anti-Merger Committee.

foreclosure and sequestration sales following foreclosure in 1896 of mortgages placed on the railroad and land grant by the federal corporation" (App. 70). In its Second Report, approving the merger, the Commission did not separately refer to this subject but it made the Examiner's Report a part of its order (App. 496) and stated that "Any contentions and arguments not specifically discussed herein have been considered and found without material significance" (App. 345).

The Committee sought reconsideration in a petition that was entirely devoted, except for one sentence, to factual issues regarding the merger. The Commission discussed the Committee's various factual contentions and found them unpersuasive (App. 467-469). The Committee thereafter intervened in the suit of the Department of Justice but no longer pressed its contentions about effects of the merger.

The District Court considered the Committee's legal issue, referred to the judicial decisions and to opinions of two United States Attorneys General, sustained the Commission's action and held that "The Commission was not required to re-litigate the issue or to withhold approval of the merger pending possible new litigation over Northern Pacific's title" (App. 55-57; Liv. J.S. App. 31-32).

A.

The basic facts are undisputed by the Committee. Railroad Co., the federal corporation, was authorized by a joint resolution of Congress in 1870 to issue bonds and secure them by mortgage of the Northern Pacific properties. The congressional resolution authorizing that action contemplated that the mortgage might "be enforced by foreclosure or other legal proceeding" (Liv. J.S. App. 75). Foreclosure

proceedings in 1896 resulted in a decree of foreclosure and sale. *Farmers Loan and Trust Co.* v. *Northern Pacific Railroad Co.*, U.S. Cir. Ct. (E.D.) Wis., unreported. At the sale the purchaser was Railway Co., a newly organized Wisconsin corporation. Railway Co. has since operated the properties as its own, and, starting in 1897, has repeatedly mortgaged them to secure bond issues of Railway Co.[7] Railroad Co. has not been dissolved but its minority stockholders are barred by laches from seeking to attack Railway Co.'s title. *Landell* v. *Northern Pacific Railway Co.*, 122 F. Supp. 253 (1954), aff'd 223 F.2d 316 (1955), cert. denied 350 U.S. 844. No suits to question Railway Co.'s title to the property are pending nor have any such suits been filed in the years since the decision in *Landell* where the holders of the small number of minority shares were held barred from prosecuting such claims. Livingston Anti-Merger Committee does not claim any interest in Railroad Co. for itself or its members.

The United States has not joined the Committee, either before the Commission or in these court proceedings, in the Committee's contentions as to jurisdiction of the Commission, title to the properties or alleged limitations on a mortgage of the properties. In 1897, as a result of charges by Railroad Co.'s minority stockholders, United States Attorney General Judson Harmon investigated and issued his opinion that the right of Railroad Co. "to the lands granted, which was perfected by the completion of its lines, passed to the purchaser [Railway Co.] under foreclosure of all its property and rights." 21 Op. Atty. Gen. 486 (1897); see *Landell* v. *Northern Pacific Railway Co.*, 122 F. Supp. at 257. The Secretary of the Interior thereupon issued regulations recognizing Railway Co. as "lawful suc-

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[7] Those mortgage bond issues are listed in Appendix F to the Commission's Second Report (App. 419).

cessor in interest" as to all the lands of Railroad Co. 28 Land Dec. 103 (1899); 29 Land Dec. 316 (1899).

In 1903, in holding that a homesteader could not acquire title to part of the right of way by adverse possession (*Northern Pacific Railway Co.* v. *Townsend,* 190 U.S. 267), this Court said:

> "The plaintiff in error, the Northern Pacific Railway Company, a corporation of the State of Wisconsin, acquired the railroad and property of the former named company on or about August 31, 1896, by purchase at a sale under foreclosure of certain mortgages." (P. 267)

In 1905, again at the request of minority stockholders of Railroad Co., Attorney General W. H. Moody reviewed the issue and confirmed the opinion of Attorney General Harmon. 25 Op. Atty. Gen. 401 (1905); (Liv. J.S. App. 32).

In 1913, this Court, with the pertinent portions of the record of the foreclosure proceedings before it (Transcript of Record in No. 47, Oct. Term 1912, pp. 523-1392) held that "the original and supplemental decrees were free from any moral or actual fraud"; that reorganization of a financially embarrassed corporation "in pursuance of a private contract between bondholders and stockholders" was permissible; and that such a contract may be "consummated by a master's deed under a consent decree." *Northern Pacific Railway Co.* v. *Boyd,* 228 U.S. 482, 502. Because shareholders of Railroad Co. had received shares in Railway Co., the property of the latter was subject to the lien of claims of non-assenting creditors, but with that exception the Court held Railway Co.'s title to be sound:

> "*As between the parties and the public generally, the* [*foreclosure*] *sale was valid.* As against creditors, it was a mere form. Though *the Northern Pacific Railroad was divested of the legal title,* the old stockholders

were still owners of the same railroad, encumbered by the same debts." (228 U.S. at 506; emphasis added)

In 1929, various controversies having arisen between the Railway Co. and the Government concerning the land grants, Congress directed the Attorney General to bring a suit to obtain "a final and complete determination of the respective rights of the United States and the Northern Pacific Railway Company" in land-grant lands (Act of June 25, 1929, 46 Stat. L. 41; Liv. J.S. App. 77; *Landell* v. *Northern Pacific Railway Co.*, 122 F. Supp. at 255). In its opinion in the case brought by the Attorney General under that act, *United States* v. *Northern Pacific Railway Co.*, 311 U.S. 317 (1940), this Court stated:

> "Pursuant to foreclosure proceedings the *Northern Pacific Railway Company acquired title to the railroad, the land grant, and all other property of the original corporation* and has since operated the road and obtained patents for millions of acres under the land grants." (311 U.S. at 328; emphasis added)[8]

The final action of the minority stockholders was their suit in 1954 for declaratory judgment seeking to set aside the 1896 decree and nullify Railway Co.'s title in favor

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[8] In the pleadings in that suit the Attorney General had alleged that Railway Co. was the successor of Railroad Co., thereby recognizing Railway Co.'s title to lands formerly owned by the predecessor company. The Court of Appeals, rejecting the effort of Railroad Co. minority stockholders to intervene and use the case as a vehicle for challenging the validity of the 1896 foreclosure, held that a decree pursuant to the position taken by the Attorney General "would be a determination of the validity of the foreclosure and reorganization, in so far as it involved a transfer of ownership to the Railway Company." *Schmidt* v. *United States*, 102 F.2d 589, 595 (9th Cir. 1939). The court further held that the Attorney General, under the Act of 1929 directing him to sue, was fully authorized by Congress to take that position (102 F.2d at 595).

of Railroad Co. A motion for summary judgment on the ground of laches was granted. *Landell* v. *Northern Pacific Railway Co.*, 122 F. Supp. 253 (D.D.C. 1954), aff'd 223 F.2d 316 (1955), cert. denied 350 U.S. 844.

B.

The questions presented by the Committee's appeal clearly do not warrant plenary review. The Examiner's Report, which the Commission incorporated in its order (App. 345, 496), fully considered the Committee's contentions and explained the basis for the conclusion that "Livingston's challenges to the Commission's jurisdiction should be dismissed as lacking in merit" (Liv. J.S. App. 39).[9] The Committee's contention does not raise even a colorable doubt about the Commission's jurisdiction. The Examiner properly held that Section 5(2)(a) of the Interstate Commerce Act "does not contemplate litigation before the Commission of title to the properties or franchises claimed by and in the possession of the applicant carriers" (Liv. J.S. App. 39-40). The circumstances in the instant case fully justify that holding. For more than 70 years Railway Co. has openly exercised the rights of ownership of the properties it acquired in 1896 and its title has been consistently recognized by the courts. Moreover, the minority stockholders of Railroad Co., the predecessor corporation, are barred by laches from further attack on Railway Co.'s title. As the District Court correctly held in rejecting the Committee's arguments: "The Commission was not required

[9] The requirements of the Administrative Procedure Act are satisfied where, as here, the "Court and the parties to the proceeding are apprised of the basis of the Commission's decision and order by looking to the total record, including the Examiner's report and recommended order." *Key* v. *United States*, 263 F.Supp. 544, 548 (S.D. Ind. 1966).

to re-litigate the issue or to withhold approval of the merger pending possible new litigation over Northern Pacific's title. For purposes of merger proceedings it could rely on the existing judicial records in that regard, supplemented by the opinions of two Attorneys General." (Liv. J.S. App. 32)

The Commission properly found no merit in the Committee's argument that the 1864 act incorporating the federal corporation and restricting its right to mortgage its properties (Liv. J.S. App. 70) also would apply to Railway Co. or to the company into which Railway Co. is to be merged. The terms of the act do not lend themselves to such a construction and, for more than 70 years, there has been no question about Railway Co.'s right to mortgage the properties, as it has done repeatedly (Liv. J.S. App. 40). Similarly, no provision of that 1864 act forbids merger of a company (Railway Co.) that purchased the properties in the foreclosure of the mortgage created by the federal corporation pursuant to the 1870 congressional resolution. Moreover, even if there had been such restrictions (and there were none), they would not continue under the provisions of Section 5(11) of the Interstate Commerce Act making the Commission's authority "exclusive and plenary" so that carriers participating in authorized transactions are relieved from all "restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for . . ." (49 U.S.C. Sec. 5(11)).

The Committee's contention that the Commission erred in upholding the Examiner's ruling sustaining an objection to the receipt of witness Lishman's legal argument as an evidentiary exhibit (Liv. J.S. App. 53) is frivolous; at the

invitation of the Examiner, the argument was included in the Committee's brief and fully considered by the Examiner (Liv. J.S. App. 34-41, 46). Furthermore, the other testimony mentioned by the Committee had been given only in response to a request made by one of the opponents of the merger (Tr. 851-853) and there had been no objection by any party to that testimony (Liv. J.S. App. 53).

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be affirmed without further briefing and oral argument.

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